

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555-scc

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5 In the Matter of:

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7 LEHMAN BROTHERS HOLDINGS, INC.,

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9 Debtor.

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13 United States Bankruptcy Court

14 One Bowling Green

15 New York, New York

16

17 November 13, 2015

18 12:11 PM

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20 B E F O R E:

21 HON. SHELLEY C. CHAPMAN

22 U.S. BANKRUPTCY JUDGE

23

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25 ECRO: MICHELLE BROWN

1 HEARING RE Doc #51311 Motion to Renew Motion to Allow
2 Disclosure of Derivatives Questionnaires

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25 Transcribed by: Nicole Yawn

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P R O C E E D I N G S

THE COURT: Okay. Let's take Lehman now, please.

(Pause)

THE COURT: Who am I hearing from?

Good afternoon.

MS. HUTNYAN: Thank you, Your Honor. Diane
Hutnyan, on behalf of Lehman Brothers.

THE COURT: Yes.

MS. HUTNYAN: your Honor, in March, we brought a
motion, as you may recall, to allow the use of the
derivatives questionnaires on discovery.

THE COURT: Right.

MS. HUTNYAN: And the Court had granted relief as
to about 4,000 counterparties that had not had an objection
to that motion.

THE COURT: Right.

MS. HUTNYAN: Since then, we've been continuing
negotiations to try and reach a global solution that would
balance the interests of the remaining parties and
confidentiality with our need to use the information. At
the Court's suggestion, we advanced an anonymization
proposal that would allow the limited redaction of
identifying information from the derivatives questionnaires.
Many were interested in the proposal, but we could not get
global consent.

1 THE COURT: Okay.

2 MS. HUTNYAN: We couldn't get critical mass. And
3 since we've been nearing the close of discovery in a couple
4 of the adversary proceedings, we decided to move forward and
5 renew the motion as to the remaining objectors. That was
6 the motion that we brought on October 30th.

7 THE COURT: Right.

8 MS. HUTNYAN: After we set this for hearing, a
9 number of the counterparties came back to us and said we
10 like the anonymization proposal. Can we continue
11 negotiating around it? And so, based on their comments, we
12 revised the proposal, and we continued discussions over the
13 -- whatever it is -- 13 days that have elapsed pretty much
14 non-stop.

15 In addition, we came up with a proposal for the
16 banks who had rejected the anonymization proposal because, I
17 think, in large part because of the volume of the materials
18 that would need to be redacted.

19 THE COURT: Right. Okay.

20 MS. HUTNYAN: And we've been negotiating with
21 everyone since then. And we have a number of people that
22 have at least opted into the anonymization proposal. Last
23 night, however, some of the parties asked about the bank
24 proposal and were interested in having that as an option.
25 And so, we extended, just last night, the bank proposal to

1 the entire pool of objectors.

2 THE COURT: Okay.

3 MS. HUTNYAN: And so, what we would like to do now
4 is prepare proposed orders that we can circulate to them.
5 We plan to do that before Monday. And that way, people can
6 review and comment on the orders. One would be an order on
7 the bank proposal, for those that want to choose that. The
8 other one would be about the anonymization proposal, for
9 those that choose to do that.

10 And then, at a hearing to be set as soon as Your
11 Honor can hear us again after November 20th -- we've asked
12 everybody to respond to us by November 20th and let us know
13 which one they prefer.

14 THE COURT: Okay.

15 MS. HUTNYAN: To set a hearing so that, if there
16 are any remaining objectors, we can hear those issues and we
17 can enter the two proposed orders. We think we should be
18 able to resolve most of the objections through the two
19 proposals.

20 THE COURT: Okay. Well, let me ask a few
21 questions. Based on the pleadings that you had then
22 submitted, we created a chart for ourselves of who's in what
23 camp. And we divided the universe, more or less, into three
24 parts. One is those parties who had objected but were
25 seeking to redact or some form of anonymization or something

1 of that sort. And there seemed to be quite a few of those
2 who filed objections along those lines.

3 Then there were the joiners, folks who seemed to
4 join the objection of parties who were willing to redact.
5 So that's kind of the pool of people, which I think
6 comprises the majority of the objectors who seem willing to
7 work with Lehman on some sort of a proposal.

8 But there is a group, what we call the unqualified
9 objectors, who just say no. So my question for you is do
10 you believe that you have gotten some indication of interest
11 from any or all of the unqualified objectors, the objectors
12 who say simply no.

13 MS. HUTNYAN: Yes.

14 THE COURT: Or are those folks talking to you?

15 MS. HUTNYAN: Yes. And, in fact, one of the
16 reasons why we realized that the bank proposal might be
17 helpful to some of the folks in the anonymization pool is
18 because, in talking with them, they were explaining why
19 anonymization just couldn't work for them. And so, they
20 asked about this proposal. And so, I'm thinking that, at
21 this point, those folks who have just received the bank
22 proposal may find that attractive.

23 It's basically a notice kind of proposal where, if
24 something is actually going to be filed in court, the
25 parties that need to file it will give that party notice.

1 And then, if they want to move to protect that piece of
2 information, they can.

3 THE COURT: So that would not be against
4 production? It would be only if it were going to be filed?

5 MS. HUTNYAN: Well, it would --

6 THE COURT: In other words, it's going to be
7 hypothetically in -- if it's going to be produced to
8 Citibank in one of the adversary proceedings, it would be
9 produced not anonymized?

10 MS. HUTNYAN: Right.

11 THE COURT: Or native form?

12 MS. HUTNYAN: Non-anonymized, correct, in its
13 original form for use in that proceeding.

14 THE COURT: For use in that proceeding? Okay.

15 So why don't I ask is there anyone -- and I could
16 list them based on our kind of counting of the heads. But I
17 could just ask. Is there anyone here who isn't interested
18 in any discussions of any kind?

19 Delightful. So --

20 MS. HUTNYAN: If I could just note something in
21 fairness?

22 THE COURT: Sure.

23 MS. HUTNYAN: I told counterparties -- after I
24 sent this out, I likely would have time.

25 THE COURT: Okay, yeah.

1 MS. HUTNYAN: And I told them there wouldn't be
2 anything on the merits.

3 THE COURT: Sure.

4 MS. HUTNYAN: So that people were flying in, they
5 wouldn't.

6 THE COURT: Right.

7 MS. HUTNYAN: So they may not be here because of
8 that.

9 THE COURT: I see. Okay. All right.

10 All right. That sounds like an excellent plan and
11 excellent progress towards, frankly, a common sense solution
12 to this issue. As long as everyone is here, I'll just ask
13 if anyone else wishes to say anything with respect to this
14 ongoing motion.

15 Come on up.

16 MS. VELAZQUEZ: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MS. VELAZQUEZ: Liza Velazquez, from Paul, Weiss,
19 on behalf of Citi.

20 THE COURT: Yes.

21 MS. VELAZQUEZ: Lehman filed reply papers two days
22 ago that misstate Citi's position and the record of our
23 discussions with Lehman on this issue. So we respectfully
24 ask the Court to permit us to respond. I'll be very brief.

25 Citi is not the one insisting that all of the DQs

1 are relevant. It is Lehman who wants to be able to use this
2 data in our litigation. Three years ago, we asked Lehman to
3 agree that both sides would limit themselves to an
4 objectively-defined subset of 40 DQs. But Lehman refused.

5 Instead, Lehman insists that its experts should
6 have the right to cherry pick from the entire universe. So
7 it's because of Lehman's litigation position that Citi needs
8 this discovery. And respectfully, we do need it without
9 further delay.

10 As Ms. Hutnyan noted, that discovery in our
11 adversary proceeding is about to close. And expert
12 discovery is about to begin. We have received a subset of
13 some of the DQs, but Lehman and its experts have had access
14 to the full universe --

15 THE COURT: Okay. We're not going to go --

16 MS. VELAZQUEZ: Understood, understood.

17 THE COURT: -- totally far afield into the
18 Citibank adversary.

19 MS. VELAZQUEZ: Understood. So we support the
20 motion.

21 THE COURT: I understand --

22 MS. VELAZQUEZ: I just wanted to clarify. Thank
23 you.

24 THE COURT: All right. Thank you.

25 Good afternoon.

1 MR. VASSER: Good afternoon, Your Honor. Good
2 afternoon. Shmuel Vasser, Dechert, LLP, for Russell. And
3 I'm not sure where we fall in your chart about not willing
4 to talk --

5 THE COURT: I think you fall in the you totally
6 object pile.

7 MR. VASSER: Okay. That's why I'm standing. We
8 totally object based on the pleading. And the only point I
9 wanted to mention -- and I'm not going to go into the
10 details of it. I'll do it if I have to.

11 The problem I have with talking is that nobody's
12 talking back. And --

13 THE COURT: What do you mean by that?

14 MR. VASSER: What I mean by that is whenever we
15 respond to a proposal, the response to us is you either take
16 what was proposed or we don't. We can't negotiate with you
17 separately. So I'm not sure how is that a negotiation.
18 We've obviously always and have been willing to talk. But
19 we have concerns. And when these concerns are not
20 addressed, I'm not sure if it's a negotiation or not.

21 I just want you to know that that's our position.
22 We're happy to talk. We are willing to resolve it. But
23 there can't be a meaningful solution when parties -- and I
24 don't know if any other parties in our --

25 THE COURT: But here's the thing. There are --

1 first of all, the backdrop is that there are 4,000
2 counterparties who didn't react at all. Okay? So that's
3 number one.

4 Number two, you now have a massive group of
5 counterparties who are represented by all kinds of great law
6 firms. And they seem to be showing a willingness to sign on
7 to the so-called bank proposal or the anonymization
8 proposal. So what's different about your client that you
9 can't engage in the same fashion as some or all these
10 parties?

11 MR. VASSER: Because it's a status conference, I'm
12 not going to -- our client has concerns. They want
13 something --

14 THE COURT: That's not good enough.

15 MR. VASSER: Then you may reject our whole
16 objection. I understand that. All I'm saying is that we're
17 talking to --

18 THE COURT: I'm asking you to explain to me what
19 distinguishes your situation from that of thousands of other
20 counterparties who have been willing to engage and respond
21 to proposals made by Lehman. What's the difference? Why --

22 MR. VASSER: We are waiting. We are making those
23 -- we responded. But when a response comes back is that we
24 can't address your concern, not because we agree or disagree
25 with them, not because they're good or bad. It's because

1 you either have to accept it or reject it. That's what I'm
2 saying.

3 THE COURT: I hear the words, but I don't
4 understand it. So have you reviewed the two proposals that
5 counsel outlined?

6 MR. VASSER: I reviewed the initial proposal that
7 was made before the renewed motion was filed. And I
8 reviewed the response that was made Thursday night before
9 the objection deadline. And we provided comments on that.
10 And they will reject them. And the one that came out last
11 night, the bank proposal, I reviewed and my clients
12 reviewed. And we'll talk about it. It may be acceptable
13 (indiscernible).

14 My only point is very simple -- is that the way
15 it's presented to us is accept or reject. That's not a
16 negotiation. That's my only point.

17 THE COURT: Have a seat, please.

18 MR. VASSER: Thank you.

19 MS. VELAZQUEZ: I've invited Mr. Vasser to talk
20 with me. I also sent him an extensive email pointing out
21 some of the issues around the things that he had raised.
22 And I'm happy to talk with him some more about it.

23 But the fact is is that I have spoken almost non-
24 stop for a week with multiple counterparties who have given
25 me feedback on these proposals, many of which have allowed

1 me to expand the proposal in areas where they were concerned
2 so as to get them into the fold. And so, it absolutely has
3 been a two-way street. And indeed, the reason why I
4 advanced the bank proposal to the others is due to feedback
5 that I had from counterparties. So it's very much a
6 negotiation.

7 THE COURT: Okay. All right. Well, I guess
8 you'll just continue it. It sounds like a negotiation to
9 me.

10 So if you can't reach agreement, I think it's with
11 -- Mr. Vasser represents Russell Investments, perhaps among
12 others. Hopefully, you'll be able to come to a meeting of
13 the minds. If not, we'll take it up at the next turn.

14 All right?

15 Yes, ma'am?

16 MS. KRAMER: Hi. Bennette Kramer, from Schlam
17 Stone & Dolan.

18 THE COURT: Yes.

19 MS. KRAMER: I represent Citadel, whose objection
20 was quoted freely. I just wanted to say that, yes, that
21 they are -- that the people from Lehman's from Quinn are
22 discussing with us. But every time they come to a point, it
23 really is a take it or leave it situation. It's not a --
24 you either take our proposal, which some of my clients have
25 had real issues with -- or we're going to just produce your

1 derivative questionnaires without any redaction whatsoever.

2 THE COURT: But that doesn't make any sense,
3 because as things stand right now, they can't produce them.

4 MS. KRAMER: That's true, but --

5 THE COURT: So unless what they're saying is that
6 agree to -- here are the proposals that Lehman is prepared
7 to support --

8 MS. KRAMER: Yes.

9 THE COURT: -- or we're going to ask the Court for
10 relief. I mean, those are the two options that Lehman has
11 at this point. They do not have the option of producing the
12 derivatives questionnaires for anyone who hasn't consented.
13 And by the derivative questionnaires' defined term, I mean
14 the actual questionnaire and the uploads. Although I do --
15 and maybe continuing to talk about it a little bit helps.

16 And I understand it's just a status conference.
17 But in the absence of -- I don't understand, among many
18 things, about this why some of the underlying agreements
19 would not be freely reproducible.

20 In other words, if there are ISDAs (ph) between
21 certain counterparties and Lehman, in the absence of a
22 provision in the ISDA or any of the CSAs or schedules or
23 other documents that it includes, if Lehman has those in its
24 files, the fact that they also happen to have been uploaded
25 into the derivatives questionnaire is kind of beside the

1 point.

2 So there's nothing, per se, about an ISDA that is
3 not producible. So that's been the part of this that's a
4 little bit of a head-scratcher for me, on the one hand. On
5 the other hand, the bar order and the surrounding matters --
6 they mean what they say. And that's why Lehman's going
7 through this process.

8 You know, there's a hard way and an easy way to do
9 things. And I think the failure to agree on a mechanism
10 will just force everyone to go to a harder way, a more
11 expensive and less efficient way to ultimately get to the
12 same place. So again, I'll remain optimistic that you'll
13 get there.

14 I know you're -- you know, I've seen the folks
15 from your firm. They're very thoughtful. And Citadel was
16 among those parties that didn't simply say no, but that
17 offered some parameters that they would feel comfortable
18 with. So hopefully, you can get on the same page.

19 MS. KRAMER: Yeah. I would note -- I'm not going
20 to go into details. But the Citadel parameters are slightly
21 narrower than --

22 THE COURT: I can see that.

23 MS. KRAMER: -- the others. And about the ISDAs,
24 let me just say real quickly. I understand, from my
25 clients, some of the ISDAs have confidentiality agreements.

1 THE COURT: Well, that's a different story.

2 Right.

3 MS. KRAMER: Right.

4 THE COURT: If the ISDAs themselves have a

5 confidentiality provision, then that's a different story.

6 But just to, you know, kind of spell out a little more what

7 I mean, in the event that Lehman were precluded --

8 continuing to be precluded from producing them and a third

9 party litigant still wanted them, a subpoena could issue.

10 And then, we would be in a situation that we would be in,

11 even if there were no DQ, right? Then you would be a third

12 party who has to respond to a subpoena and would seek a

13 protective order.

14 And then, we would be, you know, into the 107(b).

15 So that's what I meant by we would be taking the long way

16 around to ultimately get, you know, to the same place, but

17 with the burden being to show that -- I think the burden

18 would slightly shift.

19 I think this all ought to be resolved is my view.

20 And I think it's amenable to being resolved. So I'm just

21 going to remain optimistic until --

22 MS. KRAMER: Well, I appreciate that, particularly

23 since there are so many parties involved.

24 THE COURT: Right, right. Okay. All right.

25 Anyone else?

1 Okay. So how should we -- should I give you a
2 date to come back?

3 MS. HUTNYAN: Please.

4 (Pause)

5 THE COURT: What timeframe do you want the date to
6 be in? Before Thanksgiving? After Thanksgiving?

7 MS. HUTNYAN: We have asked people to respond by
8 the 20th.

9 THE COURT: Okay.

10 MS. HUTNYAN: So as soon thereafter as is
11 convenient for the Court, I think.

12 THE COURT: So I'm sorry. What did you say?

13 MS. HUTNYAN: As soon thereafter as the Court can,
14 I think.

15 THE COURT: As soon thereafter. Okay.

16 MS. HUTNYAN: The 23rd, maybe?

17 THE COURT: The 23rd's getting bad.

18 MS. HUTNYAN: Too close?

19 THE COURT: The 24th in the morning we just have
20 ANC, right?

21 THE CLERK: (Indiscernible).

22 (Pause)

23 THE COURT: Well, there's another Lehman matter
24 scheduled to be heard in the morning of the 24th. So I'm
25 inclined to try to slot you in then.

1 MS. HUTNYAN: Well, --

2 THE COURT: No?

3 MS. HUTNYAN: -- we have a deposition scheduled on
4 that day, Your Honor.

5 THE COURT: Okay.

6 THE CLERK: 23rd (indiscernible).

7 THE COURT: The 23rd.

8 THE CLERK: (Indiscernible).

9 THE COURT: Okay.

10 All right. How about the morning of the 23rd?

11 MS. HUTNYAN: The morning of the 23rd?

12 Jim?

13 UNIDENTIFIED SPEAKER: (Indiscernible).

14 MS. HUTNYAN: That'd be great, Your Honor.

15 THE COURT: The morning of the 23rd?

16 MS. HUTNYAN: Yes.

17 THE COURT: All right. So we'll have a continued
18 hearing on the motion relating to the production of the
19 derivatives questionnaire on November 23rd at 10:00 a.m.

20 MS. HUTNYAN: Thank you, Your Honor.

21 THE COURT: All right. And if you would -- if you
22 could give us a heads up, say by the end of the day on the
23 20th just in broad terms as to whether we're going ahead
24 with an argument or whether we're substantially resolved,
25 that would be useful in terms of preparation for us.

1 MS. HUTNYAN: Okay, great. And do that by filing
2 something or email?

3 THE COURT: You could file something.

4 MS. HUTNYAN: Okay.

5 THE COURT: Or otherwise, just let our chambers
6 know whether we're going to be proceeding on the merits at
7 the hearing on the 23rd.

8 MS. HUTNYAN: Okay. Okay. Good. Thank you, Your
9 Honor.

10 THE COURT: All right? Okay.

11 Thank you all very much. Have a pleasant weekend.

12 All right?

13 (Proceedings concluded at 12:31 PM)

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C E R T I F I C A T I O N

I, Nicole Yawn, certify that the foregoing transcript is a
true and accurate record of the proceedings.

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